84-230

No.

IN THE

Supreme Court of the United States

October Term, 1984

ENRIQUE CHAPMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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Questions Presented.

1. Whether the Trial Court denied a fair trial to the Petitioner by rejecting his timely motion for a severance (Fifth Amendment)?

2. Whether there was sufficent evidence to have warranted presenting this case to a jury, since Chapman was indicted solely for conspiracy, and not for any substantive crime, as were his co-defendants?

3. Whether the undercover informer, Flores, admittedly given a "free hand" by the Government in the utilization of electronic recordings of conversations between himself and targets of the investigation, violated Chapman's right to a fair trial by either losing or destroying a tape recording which was logged in as having been made by him?

The Parties.

The parties at trial were Enrique Chapman, Alfredo Rengifo, and Manuel Ocoro-Escobar. In this Court, only Enrique Chapman is a Petitioner.

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Opinion Below.

No formal opinion was rendered in the Court below, but a memorandum decision was issued. A copy of that memorandum decision is annexed as a part of the Appendix herein. An order, which is part of the memorandum decision, is also annexed.

Jurisdiction.

a) The judgment of the United States District Court for the Eastern District was rendered the 2nd day of December, 1983, convicting Chapman and two co-defendants of conspiracy to violate the narcotics laws, after trial before Honorable Charles P. Sifton and a jury. The two co-defendants, namely Alfredo Rengifo and Manuel Ocoro-Escobar, were, in addition, convicted of substantive violations of the narcotics laws (21 U.S.C. §846). The Petitioner herein was sentenced to 5 years imprisonment and has just started to serve that sentence.

The case itself was predicated upon certain conversations between the defendant-petitioner, Chapman, and an undercover individual by the name of Flores. Flores entered Mr. Chapman's travel agency and, out of the clear blue sky, asked him to sell narcotics to Flores, which Flores claimed Chapman readily agreed to do.

Chapman, who took the stand in his own defense, stated that he felt that Flores must be crazy and was just trying to humor him and never had any intention of selling him any narcotics because he was not engaged in narcotics.

A meeting which Flores arranged, at the Pan American Hotel, at which time Chapman was to deliver the narcotics, was never kept by Chapman.

Chapman, admittedly and concededly by the Government, was not present when actual narcotics were seized from the co-defendants, and, therefore, he was not charged with the substantive crime. Those drugs were never seized at the hotel.

b) Petitioner Chapman appealed to the United States Court of Appeals for the Second Circuit, which, after hearing the case, rendered a memorandum decision and order affirming the judgment of conviction, on the 27th day of June, 1984.

c) Jurisdiction to review this judgment and order by certiorari is conferred under 28 U.S.C. §§ 1254 and 1257.

Constitutional and Statutory Provisions Involved.

The Fifth Amendment of the United States Constitution is involved herein.

Background and Statement of the Case.

Enrique Chapman, a first offender who was a leading member of the Columbian community in Queens, New York, was charged with conspiracy to violate narcotics laws (cocaine), along with two co-defendants, namely Alfredo Rengifo and Manuel Ocoro-Escobar. The latter two, however, were also indicted for a substantive violation of the narcotics laws.

At no time were any narcotics found in the possession or custody of the petitioner herein. No money was ever passed to the petitioner, nor was he shown any money.

Furthermore, he produced a number of excellent character witnesses who testified to his exemplary reputation in the community.

The case was predicated primarily on the testimony of an undercover informant, Eduardo Flores, who was admittedly a professional drug pusher and conceded that he

himself had pleaded guilty to a narcotics violation which subjected him to lifelong probation. Furthermore, he acknowledged that he was paid for every "drug bust" that he made.

Several tape recordings were made by Flores, who was given more or less of a "free hand" in conducting this electronic surveillance, since the agents who supervised them admitted that they didn't even listen to the tape recordings, in many instances, that he allegedly made.

Furthermore, he had full ability to erase or otherwise modify these recordings, and had equipment at his beck and call at home, with no supervision.

Flores stated that he came one day to the Arenosa Travel Agency and, "out of the clear blue sky," approached Chapman, who he did not really know at all, and asked him to sell narcotics to Flores. According to this informant, Flores readily obtained a consent from Chapman to sell him narcotics, although they had never met before.

Chapman maintained that he felt that Flores was crazy, and, as a matter of fact, he produced a witness, who worked in his travel agency, to corroborate that testimony—that he at all times felt that Flores was insane.

Chapman testified that he solely sought to humor this individual and never had any ability, nor intention, to deal in narcotics with him.

Chapman stated that he was a professional travel agent and that he had engaged in no illicit businesses involving drugs, or anything else, at any time.

The tape recordings were allegedly made over a 3 or 4 day period. One of the tapes allegedly made on June 27th, 1983, between Flores and Chapman, which was admittedly logged in by the federal agents, for some strange reason could not be produced by the Government, nor could its disappearance be explained.

The Court below stated that since the issue had been presented to the jury, that was the only thing that was necessary. It did not deal with the spoliation charge.

Rengifo fled the jurisdiction during the trial. It was he and Ocoro-Escobar, however, who apparently had custody of drugs which were recovered by the Government agents at a point quite a distance from the travel agency which Petitioner operated. Petitioner, of course, was not present and was not indicted for any substantive drug offense.

The arrangements allegedly made between Petitioner and Flores for the sale and purchase of the cocaine was to take place at the Pan American Hotel in Queens.

The petitioner did not appear at that hotel at the appointed time, nor did either of his co-defendants. Nor were they apprehended on the way to that hotel.

Under the circumstances, we maintain that there was really no basis for the indictment here altogether, so far as the evidence against Chapman was concerned.

Although Chapman allegedly entered the car of an agent during this period of surveillance, admittedly he was not shown any money, nor were any recordings made of the conversations in that car, which is very strange since recordings were made of other conversations with Chapman.

Reasons for Granting the Writ.

I.

The Trial Court's refusal to grant a severance to petitioner severely prejudiced him since he was indicted solely for conspiracy and not for any substantive drug offense, as were his co-defendants. Thus, he was irretrievably linked with a substantive offense, although no evidence of his participation therein was ever adduced.

Timely motions for serverance were made under Rules 8 and 14 of the Federal Rules of Criminal Procedure. Nothing adduced from the co-defendants in any way incriminated Chapman. The sole substantive evidence against Chapman came from the lips of Eduardo Flores, an admitted drug pusher who was on lifetime probation, with all the incentive in the world to lie since he was admittedly paid for every "drug bust" that he brought to the attention of the Government.

Furthermore, there was no evidence that Rengifo was employed by Chapman in any way, and there was no evidence whatsoever that Chapman even knew Ocoro-Escobar.

It has been held to be reversible error to try together charges against individuals who have been indicted for separate crimes merely because one defendant was named in both charges (*Ingram v. United States,* Cir. 4th 1959, 272 F.2d 567).

Since timely motions were made for severances under Federal Rules of Criminal Procedure 8 and 14, we believe that the Court should have granted the relief.

Federal Rule of Criminal Procedure 8(d) permits a joinder of defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses.

Federal Rule of Criminal Procedure 14 gives a District Court broad discretion to sever defendants if it appears that prejudice will result from a joint trial, even if the original joinder was proper (*United States v. Werner* [2 Cir., 1980] 620 F.2d 922).

However, where the original joinder is improper under Rule 8(b), the Trial Court is required to order a severance. The matter is no longer within the Court's discretion, but is mandatory (*United States v. Santoni,* 4 Cir., 1978, 585 F.2d 667, cert. den., 440 U.S. 910; *United States v. Hedmann,* 7 Cir. 1980, 630 F.2d 1184, cert. den., 450 U.S. 965; *United States v. Kaplan,* 4 Cir., 1978, 588 F.2d 71; *United States v. Lane,* 5 Cir. 1978, 584 F.2d 60; *United States v. Coleman,* D.C. Ill., 1984, 97 F.Supp. 619).

It must be borne in mind that the testimony of any participation by Chapman in a drug conspiracy emanated from the lips of Flores. But neither Rengifo nor Ocoro-Escobar said anything that incriminated Chapman in any way, shape or form.

Chapman was nowhere near the place where the drugs were seized and, as a matter of fact, the police acted precipitously in charging Chapman altogether, we believe.

This is fortified by the fact that neither of the co-defendants went anywhere near that place, which would belie any possibility that Chapman was in any conspiratorial relationship with the co-defendants.

In determining whether to grant a severance, and to permit the defendant to take advantage of exculpatory testimony which a co-defendant (Rengifo) might give, certain factors are considered:

1. Sufficiency of a showing that the co-defendant would testify at a separate trial and waive his Fifth Amendment privilege;

2. The degree to which exculpatory testimony would be cumulative;

3. Counter-arguments of judicial economy;

4. Likelihood that the testimony would be subject to substantial damaging impeachment.

U.S. Const., Amendment V; *United States v. Finkelstein,* 526 F.2d 517, cert. den. *sub nom. Scardino v. United States,* 425 U.S. 960; *United States v. Sciandra,* 529 F.Supp. 320; and, *United States v. Gilbert,* 504 F.Supp. 565.

So far as can be judged, Rengifo may have been the source of the cocaine, since according to the testimony of Ocoro-Escobar he was the one who actually gave it to Ocoro.

Accordingly, he would have been in a position to exonerate Chapman with respect to any conspiracy count.

Certainly Rengifo was not an employee of Chapman's but merely was an independent purveyor of tickets for airlines.

Other witnesses who worked for the travel agency, of which Chapman was the head, testified that the defendant had no involvement with drugs.

So far as judicial economy is concerned, courts have frequently denied severance because of a need for the co-defendant's testimony where a pretrial motion was not made. (*United States v. Butler,* 5 Cir., 1980, 611 F.2d 1066, cert. den., 449 U.S. 380; *United States v. Nell,* 5 Cir., 1978, 570 F.2d 1251; *United States v. Diez,* 5 Cir., 1975, 515 F.2d 892, cert. den. 423 U.S. 1052).

But, in the case at bar, such a motion was actually made, so the judicial economy issue was moot, since the Court was afforded an opportunity to consider the issue prior to trial.

Finally, regarding the substantial damaging impeachment, it is obvious that in virtually any drug case an accused would be subject to impeachment, but there is no evidence that it would have been substantial or abnormally great in the case of Rengifo.

But, we ask this Court to consider the prejudicial spillover which afflicted Chapman. He was swathed with all sorts of testimony concerning delivery and receipt of drugs between Rengifo and Ocoro-Escobar and their transportation along a route that could not have taken it to the Pan-American Hotel. There was no evidence that he had anything to do with those drugs whatsoever, but nonetheless the jury was told that the evidence was relevant to him.

II.

There was insufficient evidence to have warranted presenting this case to a jury as far as Chapman was concerned. He was never seen in possession of drugs, nor was he present when the seizure of drugs occurred. Finally, he did not appear at the rendezvous, the Pan American Hotel, at the appointed hour, to meet the undercover agent Flores.

No drugs had ever been seen at the travel agency, nor was any package observed being taken out of the travel agency.

Most importantly, however, there was no evidence whatsoever of a conspiracy involving the defendant with Ocoro-Escobar or Rengifo.

Flores admitted that the defendant ultimately rejected his overtures. As a matter of fact, the recording on the 28th of June indicates that Chapman was totally disgusted with Flores and tried to throw him out of his office.

There was virtually no evidence of a conspiracy under any circumstances, involving Chapman, even with Flores, but the object of the conspiracy had to involve the co-defendants. As to this, we submit that there was no credible evidence whatsoever introduced.

(*United States v. Branker,* 2 Cir. 1968, 395 F.2d 881; *United States v. Sampol,* 636 F.2d 621; and, *United States v. Mardian,* D.C. Cir. 1976, 546 F.2d 973).

Finally, we point out that as far as judicial economy was concerned, since defendant-appellant was only charged

with one count, namely conspiracy, that could have been tried probably in a day or two.

See *United States v. Mota,* 5 Cir. 1979, 598 F.2d 995, 1001; *United States v. Crawford,* 5 Cir. 1978, 581 F.2d 489, 491; and, *United States v. Swanson,* 572 F.2d 523 (5 Cir.), cert. denied 439 U.S. 849 (1978).

A conspiracy was charged among Chapman, Rengifo and Ocoro-Escobar. There was no evidence of any conspiracy among these people. Whether or not Ocoro and Rengifo were involved in a conspiracy is one thing. It is certainly not the conspiracy that was alleged in the indictment. That conspiracy required drugs to go to the Pan-American Motel, where it was supposedly going to be exchanged for $52,000 in cash which the undercover agent, Flores, claimed he was going to deliver.

Chapman never went to that location and was never seen in possession of any drugs, nor were any packages seen being removed from the travel agency.

So far as the drugs which were ultimately recovered from Ocoro, these were apparently delivered to him at a different location completely from anywhere Chapman was invovled with, and were being transported on a route that was inconsisent with the location of the Pan-American Motel.

In *United States v. Burgos,* 579 F.2d 747 (2 Cir., 1978), that Court clearly indicated that insufficient evidence, even in a drug transaction, will not be countenanced. Thus, we ask this Court, as it did in the *Burgos* case, to reverse the conviction of Chapman, with instructions to dismiss the indictment.

There is no question but that Chapman had told Flores to leave him alone and not bother him, before his arrest (553).

The missing or destroyed June 27th tape, over which the government had complete control, is powerful corroboration of the fact that Flores was apparently seeking to avoid losing a profit by undermining his case against Chapman. It must be borne in mind that Flores conceded that he was paid per case. Thus, he had a powerful motive to lie.

Furthermore, the extremely fine character references of the defendant, and the many awards which he received, coupled with the fact that he has never been previously involved with any criminality, are strong indications of his innocence.

Moreover, the testimony of Flores is ludicrous. He stated that the defendant agreed to sell him one pound of cocaine for $26,000, but for a kilo, which is 2.2 pounds, he only wanted $52,000, thus not receiving any payment at all for two full ounces of cocaine. Certainly, a shrewd, streetwise drug dealer would not bargain away his right to two ounces of cocaine for which obviously, substantial money would be due.

Furthermore, the police themselves admitted they took no notes and they could not really corroborate, except through memory. As a matter of fact, one detective testified that he never listened to the tapes themselves at all prior to the indictment.

In I Cooley, Const. Lim. (8th Ed.) 646, Judge Cooley in this monumental work appropriately asserted:

> "In this country, where officers are specifially appointed or elected to represent the people in these prosecutions, their position gives them *immense power for oppression;* and it is to be *feared* they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused . . . .
>
> "It is the *duty of the prosecuting attorney* to treat the accused with *judicial fairness;* to inflict injury at the expense of justice is no part of the purpose for which he is chosen. *Unfortunately* however, we sometimes meet with cases in which these officers appear to regard themselves *as the counsel for the complaining party rather than impartial representatives of public justice."* (Emphasis added.)

Mr. Justice Roberts in *Sorrells v. United States,* 287 U.S. 435 (1932), in an opinion in which Mr. Justice Brandeis and Mr. Justice Stone concurred, stated (*id.* at 453):

> "The efforts . . . to obtain arrests and convictions have too often been marked by reprehensible methods . . . ."

(A)

The informer, Flores, had every motive to fabricate evidence since he was paid for every "drug bust" and also was on lifetime probation which status he could maintain if he were helpful to the government.

Since Flores was on lifetime parole and had other major felonies which he had admitted committing, the Court should have scrutinized his testimony much more carefully

and should have, after such scrutiny, dismissed the indictment, or at least granted the motion to dismiss as regards Chapman. (See *United States v. Wolfson*, 437 F.2d 862).

Additionally, Flores was unable to produce income tax records and did not pay taxes to the government in the manner in which the statute prescribes (299-302).

He stated that he lost the papers. This occurred five or six months prior to trial. The loss occurred when he was being chased in the street "by a criminal" (309).

The testimony of Candala, who worked for the defendant Chapman and who corroborated his testimony concerning Flores, was never impeached. Candala, it must be remembered, heard four conversations and actually saw Flores in the office twice (502-505).

The police did not conduct the type of investigations which they should have. They never utilized body tapes for themselves, and no experts were even called in to authenticate the tapes, despite the questions of irregularities that were raised.

Additionally, there is no evidence that the defendant ever knew Ocoro at all and, moreover, there was no evidence that Flores ever met him.

Any acquaintanceship between Rengifo and Chapman was one merely of that of a customer and an agency. Rengifo operated his own business as a freelance seller of airplane tickets.

See *United States v. Taylor*, 464 F.2d 240 (2 Cir., 1972); *United States v. Melchor-Lopez*, Arizona Cir., 1980, 627 F.2d 886.

It should be borne in mind also that Detective Ramos allegedly knew all about the missing tapes involving Flores, but the prosecution never called Ramos to the stand (318-321). Thus, the evidence was totally insufficient. The Court should never have given the case, so far as Chapman is concerned, to the jury. (See *United States v. Taylor, supra; United States v. Melchor-Lopez, supra; United States v. Odum,* Cir. Ga. 1980, 625 F.2d 620; *United States v. Soto,* Fla. Cir. 1976, 591 F.2d 1091, cert. denied 442 U.S. 930; *United States v. Cooper,* Cir. Pa. 1977, 567 F.2d 252; and, *United States v. Waddy,* Tex. Cir. 1976, 536 F.2d 632).

In *Mesarosh v. United States,* 352 U.S. 1, 9, 14, the Supreme Court reminded prosecutors that the federal courts have supervisory powers over the conduct of criminal trials. Thus the Supreme Court declared:

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."

Similarly, at an earlier time, in *McNabb v. United States,* 318 U.S. 332, the Supreme Court likewise declared:

> "We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of

liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

Conclusion.

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioner.

Certification.

I, IRVING ANOLIK, a member of the bar of this Court, certify that 3 copies of the within Petition were duly served by First Class Mail on the 8th day of August, 1984, on the Solicitor General of the United States, by depositing true copies thereof in a depository of the United States Post Office, addressed to the Office of the Solicitory General of the United States, Department of Justice, Washington, D.C. 20530.

Dated: New York, New York
August 8, 1984.

IRVING ANOLIK

APPENDIX.

Memorandum Decision.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the one thousand nine hundred twenty-seventh day of June one thousand nine hundred and eighty-four.

Present:

Honorable Amalya L. Kearse,
Honorable Lawrence W. Pierce,
Honorable Howard T. Markey,*
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

ENRIQUE CHAPMAN and MANUEL OCORO-ESCOBAR,

Defendants-Appellants.

Nos. 83-1433, 1434

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel for appellee and for defendant-appellant Chapman and was submitted by defendant-appellant Ocoro-Escobar.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgments of said District Court be and they hereby are affirmed.

Defendants Enrique Chapman and Manuel Ocoro-Escobar appeal from final judgments of the United States District Court for the Eastern District of New York, after a jury trial before Charles P. Sifton, *Judge,* convicting them of conspiracy to distribute cocaine, in violation of 21 U.S.C. §846, and convicting Ocoro of possession of cocaine with intent to distribute, in violation of 21 U.S.C. §841(a)(1). On appeal, defendants raise a number of claims of error, none of which we find persuasive.

1. Ocoro contends only that Judge Sifton erred in denying his motion to suppress cocaine seized from a car driven by Ocoro, on the ground that there was insufficient basis for the law enforcement agents to stop his car, and that the stop and subsequent seizure therefore violated his Fourth Amendment rights. We disagree. The agents had information that Chapman had agreed to sell undercover informant Eduardo Flores one kilogram of cocaine; that co-defendant Alfredo Rengifo had agreed to supply the cocaine for Chapman to sell to Flores; that Chapman had told Flores that the cocaine would be delivered that evening by Rengifo and another male; that that evening

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*Chief Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Rengifo met with Ocoro and removed from the trunk of Rengifo's car a white plastic bag that appeared to contain a package of the approximate size and shape of one kilogram of cocaine, and went into a building with Ocoro; that when the two men exited the building Ocoro was carrying the white plastic bag that Rengifo had earlier removed from his trunk; and that Ocoro had placed that package in his car. This information sufficed to give the agents following Ocoro reasonable grounds to suspect that Ocoro was engaged in criminal activity. *See, e.g., United States v. Brignoni-Ponce,* 422 U.S. 873, 779-83 (1975); *Terry v. Ohio,* 392 U.S. 1, 22 (1968). That suspicion was not adequately dispelled by the fact that Ocoro's car was heading away from the hotel earlier designated as the place for delivery of the cocaine. The district court did not err in concluding that the agents had reasonable grounds to stop Ocoro's car in order to question him and that the stop was sufficiently unintrusive that Ocoro's rights were not violated.

2. Chapman seeks to join in any argument made by Ocoro that is applicable to him. The Fourth Amendment argument made by Ocoro is not applicable to Chapman because he had no standing to object to any stopping of Ocoro's car or the seizure of the cocaine. *See, e.g., United States v. Salvucci,* 448 U.S. 83 (1980); *Rakas v. Illinois,* 439 U.S. 128 (1978).

3. Chapman argues that the court should have granted his motion for a severance. The district court has broad discretion in determining whether or not to grant a severance, *e.g., United States v. Losada,* 674 F.2d 167, 171 (2d Cir.), *cert. denied,* 457 U.S. 1125 (1982), and this Court will not reverse a district court's refusal to grant a severance unless prejudice and an abuse of discretion are

shown, *Opper v. United States*, 348 U.S. 84, 95 (1954); *United States v. Siegel*, 717 F.2d 9, 21 (2d Cir. 1983). Chapman has shown neither. His contention that if a severance had been granted Rengifo would have testified for him was conclusory and belated, and provided no reasonable basis for believing that Rengifo would have testified for Chapman or that his testimony would have exculpated Chapman. We find no basis for reversal.

4. Chapman's argument that there was insufficient evidence to support his conviction for conspiracy must also be rejected. Flores testified that Chapman agreed to sell him one kilogram of cocaine for $52,000; in a taped telephone conversation conducted in coded language, Chapman refused to give Flores a sample, saying, "these people don't sell it like that"; Chapman accompanied Flores to an automobile whose driver was a law enforcement agent and told the agent he wanted the latter to leave the $52,000 with Chapman; Rengifo told Chapman by word and gesture that he would obtain the cocaine for Chapman to sell to Flores; and Rengifo later had possession of approximately one kilogram of cocaine. Chapman testified at trial that he remembered discussing the price of cocaine with Flores and testified that he had merely been "playing along" with Flores. The jury was free to believe or disbelieve Chapman's explanation of his conduct. Viewing the evidence, as we must, in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), we conclude that the proof provided an adequate basis for a reasonable juror to find Chapman guilty of conspiracy beyond a reasonable doubt. Indeed, we regard it as the height of frivolity for a defendant whose testimony is, in essence, that he did not really *mean* it when he negotiated for a sale of cocaine, to claim that the evidence was insufficient to convict him.

5. We find no basis for reversal in Chapman's contention that Flores tape-recorded a second conversation with Chapman which was missing at trial. Although the label on the cassette was susceptible to either the reading put forward by Chapman or that put forward by the government, the issues of the proper reading and the existence of the "missing" tape were properly raised by Chapman as credibility issues, and the jury rejected Chapman's arguments. The record supports a conclusion that any suggestion that there were two such recordings was an error. Flores testified that he made only one such tape recording, and the law enforcement agent who made a record that there were two recordings satisfactorily explained the basis for his notation.

We have considered all of the arguments on appeal and have found them to be without merit. The judgments of conviction are affirmed.

AMALYA L. KEARSE, U.S.C.J.
LAWRENCE W. PIERCE, U.S.C.J.
HOWARD T. MARKEY, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.